THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2005-0512, Hales Location Owners Association v. Robert H. Carleton, Trustee of Hales Location Realty Trust, Hales Location Realty Trust of 1989, the court on March 13, 2007, issued the following order:

The respondent, Robert H. Carleton, Trustee of Hales Location Realty Trust, Hales Location Realty Trust of 1989, appeals the order of the trial court granting the petition of the petitioner, Hales Location Owners Association, for a declaration that helicopter use is not permitted in connection with the respondent's Shillaber Camp property and for a permanent injunction enjoining the respondent from helicopter operation. He also appeals the trial court's finding in favor of the intervenors, K.J. and Anne Makaitis and other members of the Hales Location Owners Association, that the respondent's helicopter operation constitutes a private nuisance. We reverse.

The respondent first argues that the trial court erred when it ruled that the Declaration of Covenants, Restrictions and Easements of Hales Location Estates applies to his Shillaber Camp property, whether or not it is subdivided. We agree.

Resolving this issue requires that we construe the agreement granting him an easement. The interpretation of this agreement is a question of law, which we review de novo. See Behrens v. S.P. Constr. Co., 153 N.H. 498, 503 (2006). "When interpreting a written agreement, we give the language used by the parties its reasonable meaning, considering the circumstances and the context in which [it] was negotiated, and reading the document as a whole." Id. Absent ambiguity, the parties' intent will be determined from the plain meaning of the language used in the agreement. Id.

The easement agreement provides, in relevant part:

> d. Restrictions: That by acceptance of this easement and recording the same and by executing the same, the [respondent] agrees that the Shillaber Camp property owned by [the respondent] being benefitted by this Grant of Easement is and forever shall be subject to a restriction and a restrictive covenant in favor of the [petitioner], that the Shillaber Camp property, so-called, may not be divided into more than three lots, the same sometimes hereinafter being referred to as the "Shillaber Lots." Further, no commercial

> uses shall be made of the Shillaber Camp property including but not necessarily limited to farming and logging and that the restrictions applicable to lots in the Hales Location Estates as set forth in Article VII of the Declaration of Hales Location Estates shall apply to the Shillaber Lots with the exception that provisions (i), (n), (o) and (x) shall not apply.

The record reveals that this agreement was negotiated in the context of a settlement agreement, which provided, in pertinent part:

> 3.4 Restrictions. A restrictive covenant shall be placed on the title to the Shillaber Camp which shall benefit Hales Location Estates and shall provide that:
>
> 3.4.1 The Shillaber Camp may be subdivided into no more than three (3) lots (the "Shillaber Lots");
>
> 3.4.2 No commercial use may be made of the Shillaber Camp, including but not limited to farming and logging; and
>
> 3.4.3 The restrictions applicable to lots within Hales Location Estates, as set forth in Article VII of the Declaration, shall apply to the Shillaber Lots, with the exception of the following provisions: (i), (n), (o), and (x).

Given the context in which it was negotiated, we conclude that the plain meaning of the easement agreement is that Article VII of the Declaration of Covenants, Restrictions and Easements of Hales Location Estates does not apply to the respondent's Shillaber Camp property unless that property is subdivided into no more than three lots. The agreement specifically states that Article VII applies to the "Shillaber Lots" and that this is a reference to the property once it is subdivided into no more than three lots. As the respondent has not yet subdivided his property, we conclude that the trial court erred when it ruled that Article VII applied to it. The trial court also erred to the extent that it ruled that any of the other articles applied to the respondent's property. The plain meaning of the easement agreement is that only Article VII applies once the property is subdivided. In light of this conclusion, we need not address the respondent's contention that RSA chapter 215-A preempted the trial court's finding that a helicopter is an "off-road vehicle" as defined by Article VII.

The respondent next asserts that the trial court erred when it found that his helicopter operation constituted a private nuisance. We agree with this argument as well.

"A private nuisance exists when an activity substantially and unreasonably interferes with the use and enjoyment of another's property." Cook v. Sullivan, 149 N.H. 774, 780 (2003) (quotation omitted). To constitute a nuisance, the respondent's activities must cause harm that exceeds the customary interferences with land that a land user suffers in an organized society, and be an appreciable and tangible interference with a property interest. Id. In determining whether an act interfering with the use and enjoyment is so unreasonable and substantial as to amount to a nuisance and warrant an injunction, a court must balance the gravity of the harm to the intervenors against the utility of the respondent's conduct, both to himself and to the community. Id. at 780-81. The intervenors have the burden of proving the existence of a nuisance by a preponderance of the evidence. Id. at 781.

We will uphold the trial court's finding of nuisance unless it lacks evidential support or is legally erroneous. Id. at 780. Having reviewed the record submitted on appeal, we conclude that it was insufficient to support the trial court's finding that the respondent's helicopter operation constituted a private nuisance.

The record reveals that only one witness, intervenor K.J. Makaitis, testified specifically about the respondent's helicopter use. Makaitis testified that approximately two or three months before trial, at midday, he heard a helicopter landing in the direction of the respondent's property. He testified that the noise from the helicopter caused his house to shake. He further testified that he saw the helicopter "flying very low." Makaitis estimated that the noise lasted for approximately two or three minutes. He testified that this occasion was the only one on which he has heard a helicopter landing in the direction of the respondent's property.

Although other witnesses testified about helicopter use in general, only Makaitis testified specifically about the respondent's helicopter use. James Mallon testified generally about helicopters flying overhead, but testified that he could not say where these helicopters landed or who was flying them. David Senzig, a noise consultant, testified based upon a helicopter flight test conducted in 2002 in Fitchburg, Massachusetts. He conceded at trial that he had no actual noise measurements of a helicopter departing or arriving from the respondent's property.

Based upon our review of the record submitted on appeal, we conclude that this evidence was insufficient, as a matter of law, to establish that the respondent's helicopter use constituted a nuisance. See Bevers v. Gaylord Broadcasting Company, No. 05-01-00895-CV, 2002 WL 1582286, at *6 (Tex. App. July 18, 2002) (not designated for publication) (as a matter of law, a single ten-minute hover of a helicopter over resident's property does not rise to the

level of substantial interference with the use and enjoyment of the underlying land), review denied (Tex. Mar. 6, 2003).

In light of our decision, we express no opinion as to the respondent's remaining arguments that the injunctive relief granted by the trial court is preempted by the Federal Aviation Act and is overly broad.

Reversed.

DALIANIS, DUGGAN and HICKS, JJ., concurred.

Eileen Fox,
Clerk